

February 4, 2019

General Services Administration
Regulatory Secretariat Division
Attn: Lois Mandell
1800 F Street, N.W.
Washington, D.C. 20405

Via www.regulations.gov

Ref: FAR case 2016-011 "Revision of Limitation on Subcontracting"

Dear Ms. Mandell:

On behalf of the Professional Services Council (PSC),¹ I am pleased to submit the following comments on the proposed FAR rule titled "Revision of Limitation on Subcontracting" published in the *Federal Register* on December 4, 2018.²

Introduction

We appreciate that the FAR Council has issued this coverage as a proposed rule and provided 60 days for public comments. It is regrettable that it has taken more than 30 months since the Small Business Administration published its final rule on May 31, 2016 to implement section 1651 of the Fiscal Year 2013 National Defense Authorization Act.³ That SBA final rule became effective on June 30, 2016.

Interestingly, on the day before the FAR Council published this proposed rule, the Department of Defense issued a class deviation to make immediately effective its procedures when issuing solicitations and awarding contracts or task or delivery orders under FAR Part 19. The class deviation shares many of the deficiencies that we highlight in these comments. DoD issued an updated version of this class deviation on January 8, 2019 making a change in the scope of coverage for "firms," and adding dates to all of the clauses attached to the class deviation.⁴ PSC is preparing comments on the revised DFARS class deviation.

In addition, also on December 4, 2018, the Small Business Administration published a proposed rule amending SBA's regulations to implement several provisions of more recent National Defense

¹ PSC is the voice of the government technology and professional services industry, representing the full range and diversity of the government services sector. As a trusted industry leader on legislative and regulatory issues related to government acquisition, business and technology, PSC helps build consensus between government and industry. Our nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the trade association's members employ hundreds of thousands of Americans in all 50 states.

² Available at: <https://www.govinfo.gov/content/pkg/FR-2018-12-04/pdf/2018-25506.pdf>

³ Available at: <https://www.govinfo.gov/content/pkg/FR-2016-05-31/pdf/2016-12494.pdf>

⁴ Available at: https://www.acq.osd.mil/dpap/policy/policyvault/USA000039-19-DPC_Class_Deviation_2019-00003.pdf

Authorization Acts.⁵ Of significance here is that this SBA proposed rule also provides further revisions to SBA's May 31, 2016 Limitation on Subcontracting rule, including adding exceptions for certain types of solicitations and resulting awards, and seeking public comment on other aspects of the Limitation on Subcontracting practice. PSC has long advocated for the adoption of some of these exceptions and we are pleased to see them included in the SBA December 2018 proposed rule. PSC is separately submitting comments on that SBA rule in support of those exceptions and we encourage the FAR Council to incorporate them into any final FAR rule.

Definition and Treatment of "Similarly Situated Entity"

Each of the FAR proposed revised contract clauses for the separate small business preference programs included in the proposed rule properly provide that first tier subcontracts awarded to a "similarly situated entity" are excluded from the calculation of the 50 percent subcontract amount that cannot be exceeded; however, the clauses then provide that all work further subcontracted by such similarly situated entity does count toward the 50 percent subcontract amount that cannot be exceeded. This formulation creates an inconsistency among small business programs and an administrative nightmare for prime contractors. We strongly urge that this further limitation be deleted.

As to the inconsistency, under the small business goaling process, small business primes are exempt from the requirement to have a small business subcontracting plan, regardless of whether that small business prime contractor subcontracts any portion of its work to another small business or even to an "other than small business" subcontractor. Similarly, an "other than small business" prime is required to have a small business subcontracting plan but is only required to flow down the plan requirement and track awards to its first small business subcontractor. Under this proposed Limitation on Subcontracting, the small business prime contractor is required to flow down this limitation to a "similarly situated" entity and to ensure that the limitation is further flowed down to subcontracts awarded by that "similarly situated" small business entity. We believe such an approach adds a significant administrative burden to both the small business prime and to each small business "similarly situated" entity.

In addition, the requirement in the proposed rule creates a further administrative challenge in tracking and determining compliance. Since there is no current subcontracting plan requirement applicable to a small business prime contractor, there is no current requirement for subcontractors of any tier to report further subcontract action to the prime (or higher tier subcontractors). Second, because the small business prime must make its representation of compliance with the 50 percent limitation on subcontracting at the time of the submission of its offer, and again at the time of the execution of its award, the prime likely has not made all of its subcontract awards or may not know – or even have reason to inquire – whether subcontractors may further subcontract work. Thus, the ability of the small business prime to comply with the limitation on subcontracting requirement is out of its control and shifts to the first tier "similarly situated entity" to whom it subcontracts.

⁵ Available at: <https://www.govinfo.gov/content/pkg/FR-2018-12-04/pdf/2018-25705.pdf>

Treatment of Independent Contractors as “Subcontractors”

The definition of the term “similarly situated entity” added in proposed FAR Part 19.001 provides that a “similarly situated entity” means a “first tier subcontractor, including an independent contractor” with the same small business program status (emphasis added). This definition is repeated in full text – not merely cross-referenced – in several of the implementing clauses.

In addition, solely in the revisions to clause 52.219-14 (relating to notice of partial small business set-asides), subparagraph (d) is added that provides explicitly that “(a)n independent contractor shall be considered a subcontractor.” We see no reason to include subparagraph (d) in this revised clause since the term is already included in the definition of the term.

More significantly, however, is the confusion caused by even including the treatment of “independent contractors” in the definition. As the supplemental information accompanying SBA’s December 4, 2018 proposed rule notes:

“It appears that SBA’s regulations at 13 CFR 125.6(e)(3) has caused some confusion as to how to properly treat independent contractors for purposes of the LOS provisions... (With respect to employee-based size standards), an independent contractor may be deemed an employee of the firm under the (SBA 1986) Size Policy Statement... (With respect to revenue-based size standards), an independent contractor could not be considered an employee of the firm... but would always be deemed a subcontractor.”⁶

SBA’s May 2016 final rule provides in 125.6(e)(3) that:

“Work performed by an independent contractor shall be considered a subcontract and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.”⁷

In our view, the SBA December 2018 proposed rule adds further confusion rather than clarity to this increasingly common situation where an individual who is an “independent contractor” may simultaneously be considered an “employee” of a contractor. To avoid further confusion, we recommend that the FAR Council delete the phrase “independent contractor” from every FAR definition of a “similarly situated entity.”

Excluding the Cost of Materials

In applying the limitation on subcontracting to the various types of acquisitions, the proposed rule provides an explicit exemption from the calculation of the limitation on subcontracting for “the cost of materials” for solicitations and awards for supplies, for general construction, and for special trade construction – but not for solicitations and awards for services. We recognize that the May 2016 SBA final rule provides the same construct. Nevertheless, we strongly urge the FAR Council to add the exemption for “the cost of materials” in services contracts. Services contractors must acquire “materials” in the performance of their work as well as construction contractors. In construction contracts, “material” may be the actual construction material (e.g. cement, bricks, plumbing supplies, etc.) but not the labor for performing the work; for services contracts, “material” may include airline

⁶ SBA 12/4/18 rule, *supra*, at 62519.

⁷ SBA 5/31/16 final rule, *supra*, at 34264.

tickets and hotel rooms in support of business travel, and vehicles and office equipment used for program support and international development assistance.

In the supplemental information accompanying the May 2016 SBA final rule regarding this topic, SBA noted that:

“As discussed below, because the limitations on subcontracting for a service contract apply only to the services portion of the contract, any ‘cost of material’ would not be part of the services to be provided through the contract and, thus, would be excluded from the limitations on subcontracting analysis on that basis.”⁸

Furthermore, SBA’s supplemental information provides that:

“As noted above, SBA believes that only the services portion of a requirement identified as a service requirement are considered in determining compliance with the limitation on subcontracting requirements... However, all costs associated with providing the service, including any overhead or indirect costs associated with those services, must be included in determining compliance.”⁹

However, this “interpretation” has not been included in the text of the SBA regulations or in the FAR proposed rule text. It is not included in the supplemental information accompanying the FAR rule. In fact, its absence from the coverage of services while being explicitly covered under other types of contracts is already causing confusion for both agencies and for small businesses.

We encourage the FAR Council to add the explicit exclusion for the cost of materials to the coverage for services contracts. At a minimum, we urge the FAR Council to include SBA’s explanatory statement in the supplemental information accompanying any final FAR rule. In our comments on the SBA December 2018 proposed rule, we are making the same recommendation to incorporate in the rule an exclusion for the cost of materials for services contracts.

Conclusion

Thank you for the opportunity to provide these comments. If PSC or I can be of any further assistance, please do not hesitate to let me know. I can be reached at (703) 875-8148 or at chvotkin@pscouncil.org.

Sincerely,



Alan Chvotkin, Esq.
Executive Vice President and Counsel

⁸ See May 31, 2016 SBA final rules, *supra*, at page 34245.

⁹ *Id*